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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. 812

BILLY FARRELL THOMERSON,
Petitioner,

vs.

STATE OF TENNESSEE,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Tennessee.

JAMES H. BATEMAN,
Stahlman Building,
Nashville, Tennessee 37201,
Attorney for Petitioner.

WILLIAM C. WILSON,
200 Union Street,
Nashville, Tennessee 37201,
Of Counsel.

ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477.

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IN THE

SUPREME COURT OF THE UNITED STATES.

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No. .....

BILLY FARRELL THOMERSON,
Petitioner,

vs.

STATE OF TENNESSEE,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Tennessee.

OPINIONS BELOW.

Petitioner's conviction of the offense of burglary in the third degree was affirmed by the Supreme Court of Tennessee in a decision reported at ... Tenn. ..., 383 S. W. 2d 25 (R. Vol. III, pp. 279-285; Appendix B).

JURISDICTION.

The original order affirming petitioner's conviction was entered on July 15, 1964 (R. Vol. III, p. 286). A petition for rehearing filed on July 31, 1964 (R. Vol. III, pp. 288-

296) was denied on October 9, 1964 (R. Vol. III, p. 302). The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1257 (3).

QUESTION PRESENTED.

Does one who is lawfully a passenger in an automobile driven by the owner thereof have standing to complain of the unlawful search of the automobile in violation of the Fourth Amendment to the Constitution of the United States applied to state proceedings through the Fourteenth Amendment to the Constitution of the United States, and to object to the introduction of the fruits of the unlawful search as evidence against him on his trial in a state court for burglary and larceny of property yielded by the unlawful search?

CONSTITUTIONAL PROVISIONS INVOLVED.

The relevant provisions of the Constitution of the United States are set forth in the Appendix, *infra*, page 11.

STATEMENT OF THE CASE.

On March 21, 1963, petitioner and a co-defendant were tried and convicted in the Circuit Court of Sumner County, Tennessee, on a charge of burglary and petit larceny of a telephone booth. It is from this trial that the Federal question presented here arises. The circumstances leading up to the trial are as follows:

On January 29, 1963, petitioner and his co-defendant were arrested as they sat in an automobile at a drive-in restaurant in Davidson County, Tennessee (R. Vol. II, p. 24). The automobile belonged to the petitioner's co-defendant, one Phillip Donald Fox (R. Vol. II, p. 28). The two were taken to the Nashville Police Station where they were questioned by City Detectives and representa-

tives of the Southern Bell Telephone Company for some period in excess of one hour. During this period, the officers had obtained a purported search warrant from a Municipal Judge and thereafter conducted a search of the automobile in the presence of Fox (R. Vol. II, pp. 30-32).

The search revealed large quantities of coins and some lock picks (R. Vol. II, p. 65). The coins were examined under ultraviolet light by the representatives of the telephone company (R. Vol. II, p. 68), and two coins were found which allegedly bore markings in invisible ink which were identified as having been placed on the coins by security officers of the telephone company. One of the coins, marked "T 34", had been placed in the coin box of the telephone booth which petitioner and Fox were charged with burglarizing (R. Vol. II, pp. 71, 72, 141-143).

On the following day, upon being confronted with this evidence, the petitioner signed a written statement in which he admitted having stolen money from telephone boxes (R. Vol. II, pp. 75-78).

The defendants had timely filed a motion attacking the validity of the search warrant and requesting that the evidence obtained through the illegal search be suppressed (R. Vol. I, pp. 7-9). At the trial, the State did not attempt to proceed on the basis of the search warrant but maintained that the search was legal because it had been consented to by the defendant Fox who owned the car (R. Vol. II, p. 19). The Trial Court sustained this contention of the State and admitted the evidence over the objection of both defendants (R. Vol. II, p. 64).

On appeal, the Supreme Court of Tennessee reversed as to the defendant Fox, holding, (1) that although it considered the arrest of the defendants a lawful arrest, the search could not be justified as incident to the arrest

since it occurred at a later time and a different place; and (2) the defendant Fox had not consented to the search (R. Vol. III, pp. 283, 284; Appendix B. p. 17).

The Supreme Court of Tennessee affirmed the conviction of petitioner solely and expressly upon the proposition that petitioner had no standing to complain of the admittedly unlawful search of the automobile which was owned by the defendant Fox (R. Vol. III, p. 285; Appendix B, p. 17).

There was never any contention that petitioner had expressly or impliedly consented to the search but, on the contrary, he learned of the search and its results after it had been completed and before giving his statement on January 30, 1963 (R. Vol. II, pp. 73, 74).

Both defendants renewed their objection to the introduction of the fruits of the unlawful search in their motion for a new trial filed April 20, 1963 (R. Vol. I, pp. 24-26), which was overruled by the Trial Judge on May 31, 1963 (R. Vol. I, p. 27), and again in their assignments of error in the Supreme Court of Tennessee (R. Vol. III, pp. 238-266).

REASONS FOR GRANTING THE WRIT.

1. The decision of the Court below is in conflict with a decision of the Court of Appeals for the Fourth Circuit in an analogous case.

In holding that the petitioner, who was an occupant of the automobile at the time of the arrest, could not avail himself of the constitutional guaranties to the right of privacy and against unreasonable search and seizure, the decision of the Court below conflicts squarely with that of the Court of Appeals for the Fourth Circuit in the fairly recent case of **United States v. Peisner and Disman,** 311 F. 2d 94.

In that case, Peisner and Disman were jointly indicted and convicted for transporting obscene books in interstate commerce. The defendants were arrested while traveling in Peisner's car, which was being driven by Peisner, and the automobile was searched and the contraband discovered under circumstances which the Court held to be unjustifiable and unreasonable under the Fourth Amendment. The Court stated, at page 105:

> "Defendant Disman has never claimed an interest in the seized contraband but he was lawfully in the car when the seizure was made. The Government acknowledges that he is a proper party to move for the suppression of the evidence under Rule 41 (e) of the Federal Rules of Criminal Procedure. We agree. Jones v. United States, 362 U. S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697 (1960)."

and reversed the conviction as to both defendants.

A motion to suppress evidence is a proper remedy under the law of Tennessee for one who has been the victim of an unlawful search (**Hughes v. State**, 145 Tenn. 544, 235 S. W. 2d 588), as is an objection made at the time the evidence is offered upon trial, as the Court recognized in the present case.

2. The decision of the Court below is in conflict with the applicable decisions of this Court.

The decision below also conflicts with the decisions of this Court in **Mapp v. Ohio**, 367 U. S. 643 (1961), and **Jones v. United States**, 362 U. S. 257 (1960).

Mapp v. Ohio, *supra*, is of course the landmark decision in which this Court held that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court and recognized that the exclusionary rule, as applied to the states, is constitutional in origin.

Jones v. United States, *supra*, was a prosecution for the possession of narcotics. The defendant was arrested in an apartment in the District of Columbia which belonged to a friend who had given him the use of it. The apartment was searched and the contraband found. The Government contended that the petitioner had no standing to object to the search because he alleged neither ownership of the seized articles nor an interest in the apartment greater than that of an invitee or guest. The Court recognized the dilemma in which a defendant is placed when his standing to object to a search is challenged and he is placed in a position where it is necessary to claim or acknowledge ownership of the contraband in order to achieve "standing", thereby incriminating himself with possession, or to deny a possessory interest, thereby losing "standing". The Court stated, at page 263, that:

> "[The] dilemma is not inescapable. It presupposes requirements of 'standing' which we do not find compelling. Two separate lines of thought effectively sustain defendant's standing in this case. (1) The same element in this prosecution which has caused a dilemma, i. e., that possession both convicts and confers standing, eliminates any necessity for a preliminary showing of an interest in the premises searched or the property seized, which ordinarily is required when standing is challenged. (2) Even were this not a prosecution turning on illicit possession, the legally requisite interest in the premises was here satisfied, for it need not be as extensive a property interest as was required by the courts below."

Under the law of Tennessee in the instant case, as correctly enunciated to the jury by the Trial Judge in his charge:

> "The possession of stolen property shortly after it is shown to have been stolen creates a presumption

that the person in possession thereof is the thief, and, if unexplained, either by direct evidence or by the attending circumstances, it is taken as conclusive, for the general rule is that a presumption of guilt arises from possession of the fruits of the crime recently after its commission" (R. Vol. I, p. 21; Vol. II, p. 231).

It is petitioner's contention that under the rule of the **Jones** case, *supra*, he had "standing" under both grounds set out above, as did the defendant in Jones. Petitioner was lawfully present in the automobile with Fox and, according to his statement, had been traveling therein with Fox since the two left Louisville, Kentucky (R. Vol. II, p. 77).

This application of the rule in the Jones case was correctly made by the Court of Appeals for the Fourth Circuit in the **Peisner** case quoted above.

3. The Federal constitutional question presented is of fundamental importance.

Mapp v. Ohio, *supra*, was based upon a thorough and searching analysis of the nature of the constitutional rights to privacy and freedom from unlawful and unreasonable search and seizure. The analysis led to the conclusion that these constitutional safeguards required the application of the doctrine of **Weeks v. United States**, 232 U. S. 383 (1914), to proceedings in state courts. In the opinion the court observed:

". . . However, the force of that reasoning [The reasoning of Wolf v. Colorado, 338 U. S. 25, which was overruled], has been largely vitiated by later decisions of this Court. These include the recent discarding of the 'silver platter' doctrine which allowed federal judicial use of evidence seized in violation of the Constitution by state agents, Elkins v. United

States, 364 U. S. 206, 4 L. ed. 2d 1669, 80 S. Ct. 1437, supra; **the relaxation of the formerly strict requirements as to standing to challenge the use of evidence thus seized, so that now the procedure of exclusion, 'ultimately referable to constitutional safeguards,' is available to anyone even 'legitimately on [the] premises' unlawfully searched**, Jones v. United States, 362 U. S. 257, 266, 267, 4 L. ed. 2d 697, 705, 706, 80 S. Ct. 725, 78 ALR 2d 233 (1960); and, finally; the formulation of a method to prevent state use of evidence unconstitutionally seized by federal agents, Rea v. United States, 350 U. S. 214, 100 L. ed. 233, 76 S. Ct. 292 (1956) . . ." (Emphasis supplied).

Since the exclusion in a state trial of evidence obtained by an unlawful search or invasion of privacy is required because of the fundamental nature of the protected rights, it logically follows that the protection must extend to all those whose rights are so protected. The **Mapp** doctrine would be lopsided indeed if it did not operate in favor of persons belonging to a class whose right to claim the benefits of the constitutional safeguards has already been well established. Petitioner contends that he is a member of such a class and that he has the standing to assert these rights under the rule of the **Jones** case, *supra*, as recognized in **Peisner**, *supra*, and indeed in the **Mapp** opinion itself, as quoted above. **Mapp** would be largely ineffectual if its rule could be so easily circumvented.

The Court states in **Jones**, *supra*, at page 266:

". . . Distinctions such as those between 'lessee,' 'licensee,' 'invitee' and 'guest,' often only of gossamer strength, ought not to be determinative in fashioning procedures ultimately referable to constitutional safeguards.";

and, at page 267:

". . . No just interest of the Government in the effective and rigorous enforcement of the criminal

law will be hampered by recognizing that anyone legitimately on premises where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him. This would of course not avail those who, by virtue of their wrongful presence, cannot invoke the privacy of the premises searched. As petitioner's testimony established Evans' consent to his presence in the apartment, he was entitled to have the merits of his motion to suppress adjudicated."

Petitioner respectfully urges that the foregoing considerations logically require the recognition of his standing to assert the rights secured to him by the Federal Constitution under the circumstances of the present case.

CONCLUSION.

Wherefore, it is respectfully requested that this petition for the writ of certiorari to the Supreme Court of Tennessee be granted.

JAMES H. BATEMAN,
Stahlman Building,
Nashville, Tennessee 37201,
Attorney for Petitioner.

WILLIAM C. WILSON,
200 Union Street,
Nashville, Tennessee 37201,
Of Counsel.

APPENDIX.

APPENDIX

APPENDIX A.

Constitution of the United States, Amendment IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Constitution of the United States, Amendment XIV, Section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

APPENDIX B.

Phillip Donald Fox and
Billy Ferrell Thomerson

vs.

State of Tennessee.

Sumner
Criminal.

In the Supreme Court of Tennessee

Appeal in Error From the Criminal Court of
Sumner County,
Honorable W. R. Puryear, Circuit Judge.

Opinion Filed.

For Phillip Donald Fox and Billy Ferrell Thomerson

Honorable William C. Wilson of Nashville, Tennessee.

For State of Tennessee
Assistant Attorney General, Thomas E. Fox

Judgment against Defendant Fox reversed and remanded

Judgment against Defendant Thomerson affirmed.

Justice Ross W. Dyer.

Phillip Donald Fox and
Billy Farrell Thomerson,

vs.

State of Tennessee.

Sumner
Criminal.

Opinion.

The defendants, Phillip Donald Fox and Billy Farrell Thomerson, appeal from a conviction of burglary in the third degree having received sentences of three years in the penitentiary.

This conviction is for burglarizing a coin-operated public telephone booth by picking the locks on the money receptacles. The booths are owned and used by the Southern Bell Telephone Company. Prior to 29 January, 1963, David Hinman, an agent of the telephone company, received information of possible thefts of money from these booths in the Nashville area and acting on this information William R. Cathy, another agent of the telephone company, "seeded" certain booths with marked coins. Information was furnished local officers of the possibility of these thefts and that defendant Fox was suspected.

On 29 January, 1963, acting on this information, a Davidson County Officer stopped defendants at a restaurant on Murfreesboro Road in Davidson County. Two Nashville detectives, Owen and Chamberlain, were sent to bring defendants to the police station for questioning. These two detectives found defendants handcuffed sitting in a patrol car and brought them, along with their car owned by defendant Fox, to the police station in Nashville.

Defendants were questioned at the police station by officers and the two agents of the telephone company, Hinman and Cathey. One of the officers obtained a search warrant for defendant's car, whereupon two police officers and the two agents of the telephone company accompanied defendant Fox outside to where the officers had left his car parked. Upon reaching the car defendant Fox was informed of this search warrant and further informed these officers would like to search the car. Defendant Fox testified he did not give permission to search. The two officers and two agents all testified defendant Fox voluntarily gave his permission to search. Upon search the car was found to contain $420.70 in nickels, dimes and quarters, lock picking equipment, pair of gloves, some coin wrappers and a lock from a money receptacle out of a telephone booth.

The coins found in defendant Fox's car were examined and it was determined, by the previous marking, one of the coins came from a telephone booth at Millersville in Sumner County. The indictment in the case at bar is based upon this theft.

Defendant Fox made an oral statement the coins found belonged to him, but denied any knowledge of the other things found. Defendant Thomerson denied any knowledge of the things found. At this time formal charges were made against defendants.

The next day defendant Thomerson made a written confession admitting the lock picking equipment was his, and he had robbed several of these telephone booths. He stated defendant Fox acted as his lookout.

The defendants assign as error the trial court's failure to quash the indictment in this case. It is contended that as a matter of law the facts alleged did not constitute burglary in the third degree. However, the argument presented in their brief on appeal is based upon the premise the facts in the record do not show a breaking and entering. Thus it is said that there could have been no burglary, only perhaps larceny.

The defendants urge that there was no breaking in this case, because the telephone booth in question, as are all similar phone booths, is open to the public. Thus it is said that entering this booth was lawful and cannot amount to a breaking. Their specific point is that the breaking is determined from how they accomplished the entrance into the booth proper, and not by the subsequent opening of the coin receptacle. This is not the law in this State.

Sec. 39-902, T. C. A., in part, provides:

"Any person who, after having entered upon the premises mentioned in Sec. 39-901, with intent to com-

> mit a felony, shall break any such premises, or any safe or receptacle therein, shall receive the same punishment as if he had broken into the premises in the first instance."

The specific language of this statute applies only to Section 39-901, T. C. A., which is the breaking and entering, by night, of a dwelling house. This Court in Page v. State, 170 Tenn. 586, 98 S. W. 2d 98 (1936), said that Section 39-902, or at least the same principle, applies also to Section 39-904, which is the basis for the prosecution in this case. In the Page case the Court said:

> "Upon the same reasoning, one, although lawfully in a business house, commits the offense described in Sec. 10913 of the Code (now 39-904), when he breaks and enters into a room of that business house, which he has no right to enter, for the purpose of committing a felony. 170 Tenn. at 589 (Parenthesis added).

Further the Court said:

> "At common law one who entered premises without a breaking did not commit burglary by breaking into a chest or drawer, and Sec. 10911 of the Code (now 39-902) was doubtlessly passed to meet that condition of the law." 170 Tenn. at 589. (Parenthesis added.)

The holding in the Page case applies to the facts in this case. Defendants could lawfully enter the telephone booth, which is a business house within the meaning of Section 39-904, but by breaking into the money receptacle after lawful entry they would be guilty of burglary in the third degree. The Trial Judge was not in error in failure to quash the indictment.

Defendants question the validity of the arrest and search of defendant Fox's automobile. The State does not try to sustain the validity of the search by the warrant, but rather as an incident to a lawful arrest or by consent of defendant Fox.

The defendants were arrested without a warrant. The taking of defendants into custody by the officers at the restaurant on Murfreesboro Road was the time and place of the arrest. Robertson v. State, 184 Tenn. 227, 198 S. W. 2d 633. Section 40-803, T. C. A., sets out under what conditions an officer may arrest without a warrant. The gist of the provisions of this statute has been set out in Jones v. State, 161 Tenn. 370, 33 S. W. 2d 59, as follows:

> "The substance of these provisions is that an officer may lawfully proceed to arrest without a warrant any person when the officer has, with reasonable cause, been led to believe that a person has committed, is committing or is about to commit a felony. It is essential to the protection of society that a wide discretion be vested in officers chosen to enforce our laws against felonies. It is impossible to define 'reasonable cause' in terms to fit all cases arising. Each case must stand on its own facts. A narrow construction would open the way for the escape of desperate criminals and the defeat of justice. One too liberal would lead to the harassment of the innocent. But the officer may not be required to wait for assurance, for evidence which would convict; when circumstances fairly point to a felony it is his duty to act, and act promptly." 161 Tenn. 370.

In the case at bar the arresting officer had information regarding possible thefts of telephone booths in the area. He further had information defendant Fox was suspected and had the license number of defendant Fox's car. We think, under these circumstances, the officer had "reasonable cause" to believe defendants had committed or were about to commit a felony. This was a lawful arrest.

The search of the automobile was not conducted at the time of the arrest, but at a later hour and in another place. The Supreme Court of the United States in two

recent cases dealing with search as an incident to lawful arrest have said:

> "Once an accused is under arrest and in custody, then a search at another place, without a warrant, is simply not incident to the arrest." Preston v. United States, 84 S. Ct. 889 (1964).
>
> "But a search can be incident to an arrest only if it is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest." Stoner v. California, 84 S. Ct. 881 (1964).

The validity of this search cannot be sustained as an incident to this arrest.

The State next insists defendant Fox voluntarily gave his consent to have his car searched. This State has long recognized a person may, by voluntary consent, waive his constitutional right to demand a search warrant. Hampton v. State, 148 Tenn. 155, 252 S. W. 1007; Frix v. State, 148 Tenn. 478, 256 S. W. 2d 449; Byrd v. State, 161 Tenn. 306, 305 S. W. 2d 273; Simmons v. State, 210 Tenn. 443, 360 S. W. 2d 10.

In the case of Hampton v. State, supra, the State suggested the validity of a search on the basis of consent. Here an officer had obtained a search warrant and had gone to the defendant's house to search for illegal whiskey. Upon confronting the defendant the officer said he had a search warrant and that the defendant may as well disclose the whiskey. The defendant did. On appeal the State contended the defendant had waived his constitutional guarantee against unreasonable searches and seizures by voluntarily consenting. The Court replied to this:

> "The conduct of Hampton, confronted by the officers with a warrant and a declaration of the purpose to search if the whiskey was not shown suggest an act of necessity, rather than volition; hence the con-

tention of the State is not sound." 148 Tenn. at 158-159.

We think the circumstances of the case at bar places it within the holding in the Hampton case. Defendant Fox had at all times after his arrest been under the control of the police, who had brought him from the point of arrest to the police station, and questioned him. After the questioning several officers went with him to where the police officers had parked his car and told him they had a warrant to search his car. To consent, under these circumstances, suggests an act of necessity rather than of volition.

Even though the evidence obtained, by the illegal search, is not admissible against the defendant Fox, such is not the case as to defendant Thomerson. It is not disputed the automobile, at the time of its seizure and search, was owned by, and in possession of, defendant Fox. Such being the case the protection extended by the Constitution against illegal searches does not inure to the benefit of defendant Thomerson. See Templeton v. State, 196 Tenn. 90, 92, 264 S. W. 2d 565; and Moody v. State, 159 Tenn. 245, 249, 17 S. W. 2d 919.

It results the judgment against the defendant, Phillip Donald Fox, is reversed and the cause as to this defendant remanded. The judgment against the defendant, Billy Ferrell Thomerson, is affirmed.

/s/ Ross W. Dyer,
Ross W. Dyer, J.

APPENDIX C.

Billy Farrell Thomerson
vs.
State of Tennessee

Sumner Criminal.
Affirmed.

Came the plaintiff in error in proper person and by counsel, and also came the Attorney General on behalf of the State, and this cause was heard on the transcript of the record from the Circuit Court of Sumner County; and on consideration thereof, this Court is of opinion that there is no reversible error on the record, and that the judgment of the Court below should be affirmed, and it is accordingly so ordered and adjudged by the Court.

It is therefore ordered by the Court that the plaintiff in error, for the offense of Burglary in the third degree as charged in the indictment, be delivered to the warden of the penitentiary or his agent and be by him conveyed to the penitentiary of the State of Tennessee and there confined at hard labor for a term of not more than Three years, commencing on the day of his reception at said penitentiary.

It is further ordered by the Court that plaintiff in error be infamous and disqualified from holding any office under this state or exercising the elective franchise.

The plaintiff in error will pay the costs of the cause accrued in this Court and the Court below, and execution may issue from this Court for the costs of the appeal. A procendendo will be issued to the said Circuit Court of Sumner County directing that Court to proceed with the collection of the cost of the cause accrued therein in the manner provided by law.

The clerk of this Court will issue a duly certified copy of this judgment to the Sheriff of Sumner County and to the Warden of the Penitentiary, to the end that this judgment may be executed. 7-15-64

APPENDIX D.

Phillip Donald Fox and Billy Ferrell Thomerson vs. State of Tennessee	Sumner Criminal.

Petition to Rehear.

The defendant, Billy Ferrell Thomerson, has filed a petition to rehear as the result of our opinion affirming his conviction filed 15 July, 1964.

We have examined this petition to rehear and find it presents no argument, authority or material fact not considered by this Court during the preparation of our original opinion.

Petition to rehear denied.

/s/ Ross W. Dyer.
Ross W. Dyer, J.

APPENDIX E.

Supreme Court, Nashville.

Phillip Donald Fox and Billy Ferrell Thomerson,	Sumner Criminal.
vs.	Petition to Rehear Denied.
State of Tennessee.	

This cause coming on further to be heard on a petition of Billy Ferrell Thomerson to rehear and reply thereto, upon consideration of all of which and the Court finding no merit in the petition, it is denied at the cost of the petitioner. 10/9/64.

APPENDIX F.

Supreme Court, Nashville.

MB 46/167

Billy Ferrell Thomerson vs. State of Tennessee.	Sumner Criminal. Stay Order.

Upon application of plaintiff-in-error, Billy Ferrell Thomerson, he is hereby granted a stay of execution of judgment of this Court for a period of ninety days from October 9, 1964, and pending the disposition of a petition for certiorari to the Supreme Court of the United States; and during said time, the plaintiff-in-error may remain released on his present bond; and it is so ordered.

The Clerk of this Court will issue a certified copy of this Order to the Criminal Court of Sumner County and to the Sheriff of Sumner County. 10/9/64

/s/ S. L. Felts,
Justice.

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No. 312

IN THE

SUPREME COURT OF THE UNITED STATES.

BILLY FARRELL THOMERSON,
Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

REPLY

To Petition for Writ of Certiorari.

GEORGE F. McCANLESS,
Attorney General,
State of Tennessee.

THOMAS E. FOX,
Assistant Attorney General,
State of Tennessee.

ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477

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IN THE

SUPREME COURT OF THE UNITED STATES.

BILLY FARRELL THOMERSON,
Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

REPLY

To Petition for Writ of Certiorari.

OPINION BELOW.

The petitioner prays that a writ of certiorari issue by this Honorable Court to review an opinion of the Tennessee Supreme Court in the case of **Phillip Donald Fox and Billy Farrell Thomerson v. State of Tennessee**, ... Tenn. ...., 383 S. W. 2d 25, as it applies to him. Appendix B to the petition.

QUESTIONS PRESENTED.

It is insisted that the question to be determined is whether or not a person who is a passenger in an automobile being driven by the owner has a standing to complain about an unlawful search of the automobile and to object to the introduction of evidence obtained as a result of the unlawful search.

Counsel for the Respondent, State of Tennessee, insists that a determination of this question is not necessary in this case since the petitioner was not a victim of the search or a person against whom the search was directed but on the other hand, only a person who claims prejudice because of the use of evidence gathered as a consequence of a search or seizure directed at someone else.

STATEMENT OF THE CASE.

The statement of the case made by counsel for the petitioner, including the disposition made of it by the Tennessee Supreme Court, is sufficiently accurate, complete, and well done to the extent counsel for the Respondent, State of Tennessee, does not consider it necessary to add thereto.

REASON FOR GRANTING THE WRIT.

Counsel for the Respondent, State of Tennessee, disagrees with the reasons advanced for granting the writ of certiorari in this case. They insist that the Tennessee Supreme Court opinion is in conflict with the opinion of the United States Court of Appeals, Fourth Circuit, in the case of **United States of America v. Peisner and Disman**, 311 F. 2d 94, and also in conflict with the opinion of this Court in the case of **Jones v. United States**, 362 U. S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697; and **Mapp v. Ohio**, 367 U. S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081.

The **Mapp** case is cited only for the proposition that the federal rule prohibiting the admission of evidence obtained by an unlawful search and seizure is applicable to the states because of the Fourteenth Amendment, Constitution of the United States, and counsel for the Respondent agrees with counsel for the petitioner on that question, so it can be eliminated from further discussion.

In the **Jones** case it was said:

> "Ordinarily, then, it is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he allege, and if the allegation be disputed that he establish, that he himself was the victim of an invasion of privacy. But prosecutions like this one have presented a special problem. To establish 'standing,' Courts of Appeals have generally required that the movant claim either to have owned or possessed the seized property or to have had a substantial possessory interest in the premises searched. Since narcotics charges like those in the present indictment may be established through proof solely of possession of narcotics, a defendant seeking to comply with what has been the conventional standing requirement has been forced to allege facts the proof of which would tend, if indeed not be sufficient, to convict him. At the least, such a defendant has been placed in the criminally tendentious position of explaining his possession of the premises. He has been faced, not only with the chance that the allegations made on the motion to suppress may be used against him at the trial, although that they may is by no means an inevitable holding, but also with the encouragement that he perjure himself if he seeks to establish 'standing' while maintaining a defense to the charge of possession."
>
> **U. S. 262**
> **S. Ct. 731.**

The other case relied upon by counsel for the petitioner, **United States v. Feisner and Disman**, supra, is identical in principle to the **Jones** case. In the **Jones** case the search was for narcotics. The proof of the possession of which was about all that was required for a conviction. The material obtained as a result of the unlawful search

in the **Peisner and Disman** case was obscene literature. Little more than possession was sufficient to justify a conviction under the federal statute.

Further, in the Jones case, the proof showed that the defendant had a key to the apartment searched and was exercising a certain amount of control over it. A short time before the search, the officers had seen the petitioner place an awning upon the apartment. In the **Peisner** case, Disman was observed with Peisner in the act of placing the contraband (obscene literature) in the automobile searched. These circumstances are sufficient to indicate the search was in fact made against the defendants, whereas in the present case, the search was directed against the owner of the car. The evidence obtained by itself had little or no probative value against the petitioner because it was not shown that he had any control of the car, that he had been in it for any particular length of time, nor that he had any intention of continuing to remain in the car. Nor had he been seen in connection with the stolen property prior to the making of the search as was true of Disman in the **Peisner** case.

The distinction between the case under consideration and the two cases relied upon by counsel for the petitioner in support of their request for writ of certiorari is well pointed out and illustrated by the circumstances and the statement made by the United States Court of Appeals, Third Circuit, in the case of **United States v. Konigsberg**, 336 F. 2d 844, in the following words:

> "In Jones, by statute, proof of possession was enough to convict. The controlling law of this appeal has no such provision or intimation. Possession is only one element of the crime charged. The theft, interstate commerce, knowledge of the theft and value of the stolen clothes all were matters of proof by the Government without which the charge would fall as a matter of law. The Jones rule governs as of course

in a proper case. It is not applicable to the issue before us. Cf. United States v. Romano, 203 F. Supp. 27, 30-31 (D. C. D. Conn. 1962). Ramirez v. United States, 294 F. 2d 277 (9 Cir. 1961)."

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CONCLUSION.

In view of the foregoing, it is respectfully requested that the writ of certiorari in this case not be granted. The reason offered for granting the writ is to the effect that the holding of the Tennessee Supreme Court in this case is in conflict with the **Jones** case, supra, and other federal cases, but when properly analyzed, these cases are distinguishable from those two cases as shown by the **Konigsberg** case.

Respectfully submitted,

GEORGE F. McCANLESS,
A. ney General,
State of Tennessee,

THOMAS E. FOX,
Assistant Attorney General,
State of Tennessee.

I certify that I forwarded a copy of this Reply to Petition for Writ of Certiorari to the Honorable James H. Bateman, Attorney at Law, Stahlman Building, Nashville, Tennessee, on this the 1st day of February, 1965.

Thomas E. Fox,
Assistant Attorney General,
State of Tennessee.